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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

11 AMERICAN CIVIL RIGHTS FOUNDATION,
a non-profit, public benefit corporation,

No. CV 07-06058 CRB

Plaintiff,

**PLAINTIFF'S REPLY IN
SUPPORT OF ITS MOTION
TO REMAND AND REQUEST
FOR ATTORNEYS' FEES**

15 CITY OF OAKLAND, CALIFORNIA, a political subdivision of the State of California, and the PORT OF OAKLAND, a public entity,

Date: January 25, 2008
Time: 10:00 a.m.
Place: Courtroom 8, 19th Floor
Judge: The Hon. Charles R. Breyer

Defendants.

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QUESTIONS PRESENTED

(1) Whether this Court, pursuant to 28 U.S.C. § 1447(c), must remand this matter to the state court in which it began for lack of subject matter jurisdiction when:

- a. Both parties agree that Plaintiff American Civil Rights Foundation (the Foundation) lacks Article III standing;
- b. Remand to state court is not futile;
- c. The Foundation has not stated a federal cause of action;
- d. Defendants have not raised a complete preemption defense; and
- e. Defendants' asserted basis for removal under 28 U.S.C. § 1442(a)(1) is time barred and inapplicable.

(2) Whether this Court, pursuant to 28 U.S.C. § 1446(b) and 28 U.S.C. § 1447(c), must remand this matter to the state court in which it began because Defendants failed to remove within the mandatory 30-day limit on removal.

(3) Whether this Court, pursuant to 28 U.S.C. § 1447(c), should award the Foundation its costs and attorneys' fees incurred in resisting this improper removal.

SUMMARY OF ARGUMENT

17 This Court should remand this matter to the state court in which it began under 28 U.S.C.
18 § 1447(c). This Court cannot adjudicate a claim over the Foundation because it lacks Article III
19 standing. *Maine Ass'n of Interdependent Neighborhoods v. Comm'r, Maine Dep't of Human*
20 *Services*, 876 F.2d 1051, 1053-56 (1st Cir. 1989). Additionally, if standing in state court is
21 *conceivable*, remand is, by definition, not futile, and is therefore mandated. *Bell v. City of Kellogg*,
22 922 F.2d 1418, 1425 (9th Cir. 1991).

23 Moreover, Defendants' asserted bases for this Court's jurisdiction are not present. First,
24 the Foundation has not stated a claim under federal law or the United States Constitution permitting
25 removal under 28 U.S.C. § 1441(b). Second, Defendants have not raised a *complete* preemption
26 defense. Third, Defendants are time-barred from raising 28 U.S.C. § 1442(a)(1) as the basis for
27 removal, and regardless, the statute is inapplicable.

28 | //

1 Separately, this Court should remand under 28 U.S.C. § 1447(c), because Defendants have
 2 failed to timely remove this matter within the 30-day time-limit imposed by 28 U.S.C. § 1446(b).

3 Lastly, because Defendants never had any objectively reasonable basis for believing
 4 removal was proper, this Court should award Plaintiff its costs and attorneys' fees incurred in
 5 resisting this improper removal.

6 **STATEMENT OF FACTS**

7 The facts and procedural history of this matter are largely undisputed. Both parties agree
 8 that the Foundation filed its Complaint, which only stated a single cause of action under state law,
 9 on July 6, 2007. The Foundation's Complaint for Declaratory and Injunctive Relief, Docket #3;
 10 Defendants' Notice of Manual Filing of Superior Court Record Volumes 1-4 (Record) at Vol. 1,
 11 Tab 1 (Complaint). The Foundation served Defendants on August 6, 2007. Defendants demurred
 12 to the Foundation's Complaint on September 24, 2007, arguing, *inter alia*, that “[t]he Port's
 13 *federally mandated ACDBE Program* is not prohibited by Proposition 209.” Defendants'
 14 Memorandum of Points and Authorities in Support of Demurrer, Docket #3, Record at Vol. 1,
 15 Tab 15 (Demurrer), at 11:3. The Foundation then filed an opposition to Defendants' demurrer on
 16 November 26, 2007. Plaintiff's Opposition to Demurrer, Docket #6, Record at Vol. 4, Tab 24
 17 (Opp. to Demurrer). Four days later, on November 30, 2007, Defendants removed this matter to
 18 the United States Northern District of California, under 28 U.S.C. § 1441(b), because, “Defendants
 19 have asserted a defense based on the application of federal law, [which] this Court has original
 20 jurisdiction to resolve.” Defendants' Notice of Removal, Docket #1 (Removal), at 2:21-22.

21 A week later, on December 7, 2007, Defendants moved to dismiss the Foundation's
 22 complaint, arguing, *inter alia*, that the Foundation did not meet Article III justiciability
 23 requirements. Defendants' Motion to Dismiss, Docket #9 (Mtn. to Dismiss), at 9:12-15:13. The
 24 Foundation then moved to remand this matter to state court, arguing, *inter alia*, that it did not meet
 25 Article III justiciability requirements. Plaintiff's Motion to Remand, Docket #27 (Mtn. to Remand)
 26 at 9:10-10:22. Both parties then opposed the respective motions. *See* Plaintiff's Opposition to
 27 Motion to Dismiss, Docket #34 (Opp. to Dismiss); Defendants' Opposition to Motion to Remand,
 28 Docket #35 (Opp. to Remand).

ARGUMENT

I

**THIS COURT DOES NOT HAVE SUBJECT
MATTER JURISDICTION TO HEAR THIS CASE**

5 The Foundation and Defendants agree on a substantial number of points. Initially,
6 Defendants bear the burden of showing that removal was proper. Also, neither party disputes that
7 28 U.S.C. § 1447(c) requires that “[i]f at any time before final judgment it appears that the district
8 court lacks subject matter jurisdiction, the case shall be remanded.” Furthermore, both parties are
9 in agreement that the Foundation’s standing is based on state law principles—not Article III
10 standing, and that a defendant cannot remove on the basis of a federal defense. The parties also
11 agree that the Foundation’s complaint is based on state law and it did not raise a federal question
12 or federal issue. The issues in dispute are: (1) whether an Article III court can exercise subject
13 matter jurisdiction over a claimant that does not have Article III standing; and (2) whether this
14 Court can assert subject matter jurisdiction, on federal questions grounds, when the Foundation’s
15 complaint only raises a single state law cause of action.

16 | A. Lack of Article III Standing Mandates Remand Not Dismissal

17 The Foundation’s standing in state court is based on California standing principles; it has
18 never asserted it meets Article III justiciability requirements. Complaint ¶ 2. In fact, both parties
19 are in agreement on this point. Nevertheless, Defendants argue that this Court can adjudicate this
20 case, in its entirety, by dismissing the Foundation’s state law claim for want of Article III standing.

21 Defendants argue that federal questions and Article III standing are separate principles.
22 Opp. to Remand at 15:3-16:17. the Foundation does not dispute that the concepts are distinct, but
23 the Foundation reiterates that lack of standing is a jurisdictional determination. *Bender v.*
24 *Williamsport Area Sch. Dist.*, 475 U.S. 534, 541-42 (1986). Moreover, lack of standing is a
25 jurisdictional defect resting on Article III case or controversy requirements. *Heckler v. Mathews*,
26 465 U.S. 728, 738 (1984). Defendants' arguments notwithstanding, as this Court has noted, "it is
27 doctrinally conventional to refer to a defect in a party's standing as triggering a lack of subject

28 |||

1 matter jurisdiction for the court.” *Mirto v. Am. Int’l Group, Inc.*, No. C-04-4998-VRWG, 2005
 2 WL 827093, at *3 (N.D. Cal. Apr. 8, 2005).

3 Defendants’ argument is that the Foundation has failed to provide sufficient support for its
 4 proposition that lack of standing requires remand not dismissal. Opp. to Remand at 16:10-14.

5 In *Mirto*, the plaintiffs filed in Alameda County state court and the defendants removed.
 6 *Mirto*, 2005 WL 827093, at *1. Both parties agreed, however, that the plaintiff did not have Article
 7 III standing. Thus, the only question was whether remand or dismissal was appropriate. This Court
 8 laid forth numerous justifications why remand, not dismissal was the answer:

9 First, as already noted, it is doctrinally conventional to refer to a defect in a party’s
 10 standing as triggering a lack of subject matter jurisdiction for the court. Second, a
 11 leading treatise on federal procedure suggests that remand, rather than dismissal,
 12 is appropriate when the plaintiff lacks standing in federal court Third, the
 13 cases cited in that treatise uniformly hold that remand is appropriate. [The court
 14 goes on to list three additional reasons supporting remand.]

15 *Id.* at *3 (citations omitted). The *Mirto* Court’s fifth reason deserves particular attention, because,
 16 in the case at bar, the Foundation has made the same argument to Defendants in its Opposition to
 17 Dismiss. Opp. to Dismiss at 12:19-13:4. The *Mirto* Court notes:

18 Fifth, a practical reason supports remand in this case: If dismissal were the
 19 appropriate procedure in cases like this, plaintiffs would likely refile in state court,
 20 only to have their cases removed and dismissed again. Like Sisyphus, condemned
 21 to roll a heavy rock up a hill only to have it roll back down just before he reaches
 22 the top, these plaintiffs would never see a resolution on the merits.

23 *Id.* at *3.

24 State courts are free to apply state standing principles *even* in cases where the plaintiff
 25 asserts a federal cause of action. *See City of L.A. v. Lyons*, 461 U.S. 95, 113 (1983); *N.Y. State*
Club Ass’n, Inc. v. City of N.Y., 487 U.S. 1, 8 n.2 (1988). Thus, the futility of final judgment on
 26 the Foundation’s failure to meet Article III justiciability requirements is clear. Such a ruling would
 27 not prevent the Foundation from litigating this exact same case under California justiciability
 28 principles.

29 In *Maine Ass’n of Interdependent Neighborhoods*, 876 F.2d 1051, the court was presented
 30 with this precise issue. The Maine Association of Interdependent Neighborhoods (MAIN)
 31 originally filed in state court, and the defendant state commissioner removed. *Id.* at 1052-53.

1 Indeed, both parties agreed that MAIN's action arose under federal law. *Id.* at 1053. Once in
 2 federal court, the Commissioner moved to dismiss for lack of standing; moreover, MAIN conceded
 3 it did not have standing to sue in federal court. *Id.* The district court dismissed for lack of standing
 4 and MAIN appealed arguing that remand, not dismissal, was proper. *Id.* The court agreed and
 5 remanded. *Id.* at 1056.

6 The court began by making clear that it did not have discretion to dismiss under 28 U.S.C.
 7 § 1447(c):

8 The district court determined that MAIN did not fulfill the minimal, constitutional
 9 requirements for standing, *i.e.*, that its members suffered no "immediate or
 10 threatened injury." This is a determination that the district court lacked subject
 matter jurisdiction. Hence, the literal words of the statute, saying that the case
 "shall" (not "may") be remanded, require the court to remand the case.

11 The district court recognized that "[l]ack of standing is a jurisdictional defect which
 12 requires the federal court to *remand*." The court, nonetheless, dismissed the
 case

13 We think, however, that the district court erred in departing from the literal words
 14 of § 1447(c), which, on their face, give it no discretion to dismiss rather than
 remand an action.

15 *Id.* at 1053-54 (citations omitted). Next, the Court set out the reasons why lack of standing
 16 mandates remand, even where the parties agreed that the issue was a federal question:

17 First, MAIN points out that it may have standing to sue in the Maine state courts,
 18 even though it does not meet federal standing requirements, because Maine's
 standing rules are somewhat more liberal

19 Second, if the case were remanded to state court, the Maine Commissioner would
 20 not be able to remove it again. He could not do so under 28 U.S.C. § 1441(b), for
 21 it is now clear that the federal courts lack "original jurisdiction" over the action,
 because of MAIN's lack of standing

22 All this is to say that in the context of this case, Maine procedural law is a matter
 for the Maine state courts to decide.

23 *Id.* at 1054-55 (citations omitted). Finally, the court made clear that this did not leave the
 24 defendants without any remedy.

25 We are aware of no federal law preventing the Maine court from deciding the
 26 federal questions presented by this case And, the Commissioner has means to
 27 resolve the conflicts that such a decision might bring about [T]he
 Commissioner may appeal the state court's decision on questions of federal law to
 the Supreme Court.

28 *Id.* at 1056 (citations omitted).

1 Indeed, every circuit court that has addressed the issue has found that remand, not dismissal,
 2 was proper. In *Wheeler v. Travelers Ins. Co.*, 22 F.3d 534 (3d Cir. 1994), the Third Circuit
 3 reexamined the plaintiff's standing *sua sponte*, since it was not contested. *Id.* at 537. The court
 4 found that the plaintiff did not have Article III standing. *Id.* at 538. Thus, the court concluded that
 5 "federal law 'only requires . . . [us] to remand [plaintiff's case] to state court.'" *Id.* at 540 (quoting
 6 *Bradgate Associates, Inc. v. Fellows, Read & Associates, Inc.*, 999 F.2d 745, 751 (3d Cir. 1993)).
 7 The Sixth Circuit reached an identical conclusion in *Coyne v. Am. Tobacco Co.*, 183 F.3d 488
 8 (6th Cir. 1999). There, plaintiffs filed an action in state courts basing their standing on state
 9 standing principles. *Id.* at 491. The defendants removed. *Id.* at 492. Because plaintiffs' standing
 10 was based only on state standing grounds, the court held that the injury was not concrete and
 11 particularized so as to confer Article III standing. *Id.* at 494-95. Because plaintiffs lacked
 12 Article III standing, the "[c]ourt lack[ed] subject matter jurisdiction and this action [had to] be
 13 remanded to the state court from which it was removed." *Id.* at 496.

14 In its previous filings with this Court, the Foundation noted this Court's previous holding
 15 in *People of the State of California v. Beltz Travel Serv., Inc.*, 379 F. Supp. 948 (N.D. Cal. 1974).
 16 In *Beltz Travel*, this Court held, "[s]ince Plaintiffs *lack standing* to maintain an action in federal
 17 court *based on the federal issues raised* in the complaint, the case was improperly removed from
 18 state court." *Id.* at 950-51 (emphasis added); *see also* Opp. to Dismiss at 11:5-18; Mtn. to Remand
 19 at 10:4-11.

20 Additionally, *Boyle v. MTV Networks, Inc.*, 766 F. Supp. 809 (N.D. Cal. 1991), provides
 21 this Court with a case nearly factually and procedurally identical to the instant action. There,
 22 plaintiff filed in state court, on state standing principles, and defendants removed arguing that
 23 Boyle had "artfully pled" federal causes of action, and the claims were completely preempted by
 24 federal law. *Id.* at 812, 814-16. Like Defendants here, the *Boyle* defendants were so obviously
 25 aware that plaintiff's lack of federal standing was fatal to this Court's jurisdiction, that *defendants*
 26 argued in favor of plaintiff's standing. *Id.* at 817. This Court rejected defendants' arguments
 27 reiterating that, "[s]tanding is an integral component of subject matter jurisdiction If Plaintiff
 28 ///

1 lacks standing, this Court has no subject matter jurisdiction and must remand the case to state
 2 court.” *Id.* at 816 (citations omitted).

3 While the Ninth Circuit has not squarely addressed the issue, it has on several occasions
 4 hinted that remand is appropriate where the plaintiff lacks standing as to all defendants. *See, e.g.,*
 5 *Bell*, 922 F.2d 1418; *Lee v. Am. Nat'l Ins. Co.*, 260 F.3d 997 (9th Cir. 2001); *see also Mirto*, 2005
 6 WL 827093, at *3 (discussing the Ninth Circuit’s dicta on this issue). In *Lee*, two defendants
 7 removed plaintiff’s state law claim to federal court under diversity principles. *Lee*, 260 F.3d at 999.
 8 Also, plaintiff did not have standing as to *one* defendant because plaintiff had not suffered a
 9 particularized injury as to that defendant. *Id.* at 999-1000. However, because the court still
 10 retained subject matter jurisdiction as to the other defendant, remand, as to that defendant, was
 11 inappropriate. *Id.* at 1005-06. In fact, the court recognized that:

12 [the plaintiff’s] standing-deficient claims will have to be disposed of in some
 13 manner on remand to the district court. Whether the district court dismisses the
 14 ANTEX claims, or Lee dismisses them voluntarily, *there should be no obstacle to*
Lee’s refiling them in state court, where he apparently has a viable cause of action
 which is not time-barred.

15 *Id.* at 1006 (emphasis added).

16 Here, both parties agree that the Foundation has no standing with respect to either
 17 Defendant. The commands of 28 U.S.C. § 1447(c) do not leave this Court with discretion when
 18 a plaintiff lacks standing. This Court’s previous rulings on the issue are in line with every circuit
 19 that has addressed it—the Court must remand. Dismissing the Foundation’s claims for lack of
 20 standing places the Foundation in the position of Sisyphus, hopelessly rolling the rock uphill.
 21 Accordingly, remand, not dismissal is appropriate.

22 **B. Remand to State Court Is Not Futile**

23 Defendants’ futility argument first cites *Bell*, and then summarily argues why the
 24 Foundation lacks taxpayer and citizen standing under California standing principles.¹ Opp. to
 25 Remand at 16:18-22:23. In *Bell*, the Ninth Circuit recognized a futility exception to 28 U.S.C.
 26

27 ¹ Initially, it should be noted, Defendants’ argument that remand would be futile is made for the
 28 first time in its Opposition to Plaintiff’s Motion for Remand, after exceeding the page-limit
 imposed by this Court on opposition briefs. J. Breyer Standing Order #5.

1 § 1447(c). *Bell*, 922 F.2d at 1425. Bell brought a lawsuit under an Idaho statute that required the
 2 plaintiff to post a bond in order to have standing. *Id.* Because Bell failed to post the bond, remand
 3 was futile. *Id.* The Ninth Circuit recognized that if a successful assertion of state standing was
 4 *conceivable*, remand, not dismissal, would have been appropriate. *Id.*

5 Here, the Foundation asserts two independent bases for standing in state court: (1) taxpayer
 6 standing under Code of Civil Procedure section 526a; and (2) citizen standing, as recognized in
 7 *Connerly v. State Pers. Bd.*, 92 Cal. App. 4th 16, 29 (2001).

8 Defendants' argument against the Foundation's state taxpayer standing relies almost
 9 exclusively on *Cornelius v. L.A. County Metro. Transp. Auth.*, 49 Cal. App. 4th 1761 (1996). Opp.
 10 to Remand at 17:16-19:21. Not only was the reasoning of *Cornelius* specifically questioned in
 11 *Connerly*, 92 Cal. App. 4th at 29, but *Cornelius* has nothing to do with this case. In *Cornelius*, the
 12 plaintiff could not establish taxpayer standing because he was neither a resident nor a taxpayer of
 13 Los Angeles County. *Cornelius*, 49 Cal. App. 4th at 1774-75. Here, the Foundation alleges
 14 properly that at least one member of its organization is a citizen and has paid "property taxes and
 15 assessments on property located within the City within the last year." Complaint ¶ 2.

16 Defendants' argument that the Foundation lacks citizen standing is also without merit.
 17 Defendants erroneously argue that the Foundation must be a "natural born citizen." *Waste Mgmt.*
 18 *of Alameda County, Inc. v. County of Alameda*, 79 Cal. App. 4th 1223, 1237 (2000) ("A
 19 corporation may . . . be accorded attributes of a citizen."). Moreover, Defendants' argument that
 20 the Foundation needs to show a "beneficial interest," is exactly opposite to California law, which
 21 holds, "a citizen's action is a long-established *exception* to the requirement of a personal beneficial
 22 interest." *Id.* at 1236 (emphasis added).

23 The intricacies and complexities of Defendants' argument that the Foundation, a non-profit
 24 California corporation, fails to meet either of California's liberal standing requirements, belie its
 25 contention that remand would be futile. Opp. to Remand at 16:18-22:23. State standing in this
 26 case is, at a minimum, *conceivable*, and as the Foundation's complaint clearly meets California
 27 standing requirements, nothing more needs to be shown. (See also Opp. to Demurrer at 15:7-22:13

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1 where Foundation responded to these same arguments in state court.) It is not for this Court to
 2 decide whether the Foundation has standing under state law principles.

3 Accordingly, this Court should remand this action to the state court in which it began.

4 **C. Plaintiff Has Not Alleged a Cause of Action Under Federal Law**

5 In their Notice of Removal, Defendants assert that this Court, under 28 U.S.C. § 1441(b),
 6 has original jurisdiction to resolve the federal question presented, because “Defendants have
 7 asserted a defense based on the application of federal law.” Removal at 2:21-22. Now, Defendants
 8 admit, “Defendants [demurrer] did not trigger removal, in that such statements, at best, posed an
 9 affirmative defense, which all parties recognize does not afford grounds for removal under
 10 Section 1441(b).” Opp. to Remand at 9:1-4.

11 Both parties agree that the Foundation’s complaint only alleges a cause of action under
 12 California law. Both parties agree that Defendants’ demurrer to the complaint posited affirmative
 13 defenses to the Foundation’s complaint, which implicated federal law. The Foundation, however,
 14 did not raise a federal issue upon which this Court can base its jurisdiction.

15 Article I, section 31(e), is an affirmative defense and must be pled as one. *C & C Constr., Inc. v. Sacramento Mun. Util. Dist.*, 122 Cal. App. 4th 284, 298 (2004). Thereafter, California
 16 courts decide whether defendants have met affirmative defense requirements. That California
 17 Courts apply standards first enunciated in federal cases to determine whether a defendant has met
 18 an affirmative defense, does not transform a California state affirmative defense into a federal
 19 cause of action. However, this, in essence, is Defendants’ argument. Opp. to Remand at 10:19-
 20 11:2. The Foundation has responded to this argument at length in two previous briefs with this
 21 Court, and refers this Court to those briefs. *See* Opp. to Dismiss at 6:1-7:16; Remand at 7:13-9:9.

22 Nonetheless, Defendants now argue: (1) The “complete preemption” doctrine; and
 23 (2) 28 U.S.C. § 1442(a)(1). Neither argument has merit.

24

25 **1. Plaintiff’s Claim Under Article I, Section 31, of the California
 26 Constitution Is Not Completely Preempted By Federal Law**

27 As Defendants note, the test for complete preemption “is whether Congress clearly
 28 manifested an intent to convert state law claims into federal-question claims.” *Ansley v.*

1 *Ameriquest Mortgage Co.*, 340 F.3d 858, 862 (9th Cir. 2003). Defendants omit the preceding
 2 sentence, which states, “[c]omplete preemption, however, arises only in ‘extraordinary’ situations.”
 3 *Id.* Indeed, “[t]he Supreme Court has construed only three federal statutes to so preempt their
 4 respective fields as to authorize removal of actions seeking relief exclusively under state law.”²
 5 *In re Miles*, 430 F.3d 1083, 1088 (9th Cir. 2005).

6 49 U.S.C. § 47107(e) and Part 23 do not completely preempt claims under Article I,
 7 section 31, of the California Constitution. The test is whether Congress intended to convert state
 8 law claims into federal-question claims; there is no question complete preemption does not apply.
 9 As Defendants’ acknowledged, “[t]he rule of law is clear: no private right of action exists under
 10 the Airport and Airway Improvement Act (AAIA), 49 USCA Section 47107 et seq.” Opp. to
 11 Remand at 21:22-23. Congress could not have intended to convert state claims into federal-
 12 question claims without providing *any* federal-question claims.

13 Because Defendants cannot argue that no Article I, section 31, claims may ever be brought
 14 in state court, they argue that in regard to the Port of Oakland’s ACDBE Program, the Foundation’s
 15 Article I, section 31, claim is preempted. *See* Opp. to Remand at 13:1-15:2. This, however, is a
 16 conflict preemption defense, not *complete* preemption. Only the latter is a basis for removal.
 17 Whether the statute and regulations constitute a federal defense is a matter for the state courts.
 18 *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 2 (2003).

19 Thus, jurisdiction in this Court cannot be based on complete preemption.

20 **2. Defendants’ Argument Under 28 U.S.C. § 1442(a)(1)
 21 Is Time-Barred and an Inapplicable Basis for Removal**

22 Defendants’ final argument is that the Port and City of Oakland are agents of the federal
 23 government vis-á-vis the Port’s implementation of the ACDBE Program. Opp. to Remand at 11:3-
 24 12:26. Defendants then argue they are entitled to remove under 28 U.S.C. § 1442(a)(1). *Id.*

25 As an initial matter, Defendants’ argument is time barred. “In [the Ninth] Circuit, it is
 26 well-settled that substantive amendments to a notice of removal may not be made after the

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 28 ² For a discussion of the cases where the Supreme Court has found complete preemption see Opp.
 to Dismiss at 8:3-8:20.

1 thirty-day period specified in 28 U.S.C. § 1446(b)." *Britton v. Rolls Royce Engine Services*,
 2 No. C05-01057 SI, 2005 WL 1562855, at *3 (N.D. Cal. June 30, 2005) (citing *Barrow Dev. Co.*
 3 v. *Fulton Ins. Co.*, 418 F.2d 316, 317 (9th Cir. 1969); *O'Halloran v. Univ. of Wash.*, 856 F.2d
 4 1375, 1381 (9th Cir. 1988)). As explained below in Part II, Defendants filed their untimely Notice
 5 of Removal in this case under 28 U.S.C. § 1441(b) on November 30, 2007. The first mention of
 6 28 U.S.C. § 1442(a)(1) was in Defendants' opposition to remand filed January 4, 2008, more than
 7 30-days after their initial untimely-removal.

8 Substantively, Defendants' argument is also without merit. Defendants' cases give no
 9 support to the proposition that the City and Port of Oakland may remove under 28 U.S.C.
 10 § 1442(a)(1). In *Clio*, the U.S. Secretary of Health and Human Services personally removed the
 11 case, moved to intervene, and was the real party in interest. *Clio Convalescent Ctr. v. Michigan*
 12 *Dep't of Consumer & Indus. Services*, 66 F. Supp. 2d 875, 876-77 (E.D. Mich. 1999). Conversely,
 13 in this case neither the FAA nor DOT—the only relevant Federal agencies here—has made any
 14 attempt to intervene in this claim arising only under state law.

15 Defendants' reliance on *Magnin v. Teledyne Cont'l Motors*, 91 F.3d 1424 (11th Cir. 1996),
 16 is also misplaced. This Court's holding in *Britton* stated:

17 *Magnin* is factually distinguishable from this case, because plaintiffs' complaint
 18 here does not name any individual defendants, does not specifically identify DAI
 19 as a DMIR and does not expressly allege that defendant's issuance of an
 airworthiness certificate was a proximate cause of the accident; in fact, it makes no
 mention of any such certificate.

20 *Britton*, 2005 WL 1562855, at *4. Similarly, the Foundation's claim here does not name any
 21 individual defendants, does not specifically identify the FAA or DOT, and does not expressly allege
 22 that Defendants are violating the Equal Protection Clause, United States law, or FAA regulations.

23 Accordingly, as Defendants' 28 U.S.C. § 1442(a)(1) basis for removal is time barred and
 24 inapplicable, this Court does not have subject matter jurisdiction under 28 U.S.C. § 1447(c).

25 II

26 DEFENDANTS' REMOVAL IS UNTIMELY

27 Even if a basis for this Court's exercise of jurisdiction existed (which it clearly does not),
 28 Defendants failed to timely remove this case.

1 Both parties agree that the legal doctrines governing the timeliness of removal are under
 2 28 U.S.C. § 1446(b).³ Because Defendants did not remove within 30-days of receipt of the
 3 Complaint, they rely exclusively on the second paragraph of 28 U.S.C. § 1446(b), which states:
 4 “[i]f the case stated by the initial pleading is not removable, a notice of removal may be filed within
 5 thirty days after receipt by the defendant . . . of a[n] . . . other paper from which it may first be
 6 ascertained that the case is one which is or has become removable.” Defendants argue that they
 7 only ascertained that the case was removable after the Foundation filed its opposition to
 8 Defendants’ Demurrer. Opp. to Remand at 9:5-15.

9 It is without question that artfully pleading a complaint to avoid stating a federal cause of
 10 action will not defeat removal. *See Rivet v. Regions Bank of La.*, 522 U.S. 470 (1998). However,
 11 Defendants do not argue that the Foundation artfully pled a federal *cause of action*, rather
 12 Defendants assert that the Foundation’s Opposition to Demurrer artfully pled “that the ACDBE
 13 Program involved equal protection *issues* and implicated the constitutionality of a federal
 14 regulatory scheme.” Opp. to Remand at 8:17-19 (emphasis added).

15 However, to whatever extent these issues may be present, the facts are clear that Defendants
 16 ascertained them by the time they filed their Demurrer. Throughout Defendants’ Demurrer, they
 17 rely on federal statutes and federal regulations. Demurrer at 1, 6-14, 20-23. Defendants’ statement
 18 of facts in support of their Demurrer claim that “[t]he ACDBE Regulations require airport grant
 19 recipients . . . to draft and adopt ACDBE programs and submit them to the FAA for approval.”
 20 Demurrer at 7:8-9. Defendants also claim “[t]he Port [has a] Federally Mandated ACDBE
 21 Program,” then state that “Plaintiff has apparently overlooked . . . that each of those [challenged]
 22 provisions are either specifically required or authorized by federal regulation.” *Id.* at 8:23, 9:13-15.

23 Indeed, the first *argument* Defendants make in their Demurrer is that “[t]he Port’s *federally*
 24 *mandated ACDBE Program* is not prohibited by Proposition 209.” *Id.* at 11:3 (emphasis added).

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 27 ³ In their citations to the procedure for removal, Defendants rely erroneously on 28 U.S.C.
 28 § 1441(b). Opp. to Remand at 4:7-16, 5:24-28, 6:10-17, 9:13-15. The Foundation believes
 Defendants intended to reference 28 U.S.C. § 1446(b), which governs the timeliness of removal.

1 For the Court's convenience, the Foundation now includes Defendants' asserted basis for removal,
 2 verbatim:

3 Defendants allege that Proposition 209's prohibitions are in conflict with the
 4 *federally-mandated requirements of the ACDBE Program*. Thus, where, as here,
 5 Plaintiff has brought a state constitutional challenge to a federal program governed
 6 by 49 CFR Part 23, and Defendants have asserted a defense based on the
 7 application of federal law, this Court has original jurisdiction to resolve the federal
 8 question presented.

9 Removal at 2:18-22 (emphasis added). Defendants' primary argument demurring to the complaint
 10 is *identical* to their statutory basis for removal. Clearly, Defendants had ascertained the issues for
 11 which they removed (November 30, 2007) by the time they demurred (September 24, 2007)—well
 12 past the 30-day limit on removal.

13 To avoid this obvious problem in the timeliness of their removal, Defendants searched
 14 through the Foundation's opposition to demurrer for anything new upon which to now base their
 15 timeliness argument. Defendants find the Foundation's citations to three federal cases in its
 16 opposition, and devote the bulk of their timeliness argument explaining to this Court the holdings
 17 of *Western States*, *Croson*, and *Adarand*. Opp. to Remand at 7:17-8:19. Defendants, however, fail
 18 to find any case holding that citations to federal cases can be the basis of removal.

19 While not necessary to show that Defendants' removal was untimely, Defendants' decision,
 20 in their Opposition to Remand, to quote an entire page of the Foundation's opposition to demurrer,
 21 merits a response. The page Defendants quote can be found under the section showing why
 22 Article I, section 31(e), does not apply to Defendants' ACDBE Program. Since Defendants had
 23 raised section 31(e) as a defense (which Defendants now concede was an affirmative defense), the
 24 Foundation was explaining why it is inapplicable. Opp. to Remand at 9:2-4; Opp. to Demurrer at 9.
 25 This is abundantly clear by reading Defendants' quotation of the Foundation's Opposition to
 26 Demurrer.

27 On the one hand, Defendants assert that this Court has jurisdiction because there exist
 28 federal issues which this Court has the subject matter jurisdiction to hear. But because these issues
 29 were at the forefront of Defendants' Demurrer, they argue their removal was timely because the
 30 Foundation was "the party to introduce the holding of *Western States*" and two other Supreme

1 Court cases. Opp. to Remand at 7:17-18. Moreover, if, as Defendants argue, their raising the
 2 federal issues was merely an affirmative defense, the Foundation's responding to their affirmative
 3 defense by citing a federal case cannot raise a new federal issue. Regardless, timeliness is governed
 4 by when the federal issues were ascertainable, not when new federal cases are cited.

5 Because Defendants' Demurrer, filed September 24, 2007, demonstrates that Defendants
 6 had ascertained the federal issues upon which they base their removal, filed November 30, 2007,
 7 their removal is untimely. Accordingly, the Court should remand this case to the state court in
 8 which it began.

9 **III**

10 **PLAINTIFF IS ENTITLED TO ITS COSTS
 11 AND ATTORNEYS' FEES INCURRED IN
 12 CHALLENGING THIS IMPROPER REMOVAL**

13 Both parties are in agreement that the awarding of costs and attorney's fees is governed by
 14 28 U.S.C. § 1447(c) and *Martin v. Franklin Capital Corp.*, 546 U.S. 132 (2005). Defendants are
 15 mistaken, however, to argue that they had an objectively reasonable basis to remove this case to
 16 federal court.

17 Defendants removed this case on November 30, and immediately filed their motion to
 18 dismiss a week later, on December 7, 2007. In that motion, Defendants argued, *inter alia*, that this
 19 Court should dismiss for the Foundation's lack of standing. Defendants improperly believed that
 20 by removing a plaintiff without Article III standing, they could achieve a quick dismissal of the
 21 case. However, as this brief and the Foundation's previous filings make clear, Defendants had no
 22 objectively reasonable basis for believing so.

23 Additionally, Defendants removed this matter well after their time to do so elapsed, and
 24 without the Foundation having stated a federal cause of action as required under 28 U.S.C.
 25 § 1441(b).

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Accordingly, the Foundation is entitled to its costs and attorneys' fees incurred in this improper removal.⁴

CONCLUSION

This removal is untimely and this Court is without jurisdiction to hear this matter. 28 U.S.C. § 1447(c) provides that in such situations, the Court must remand the action to state court. In addition to remanding this action, this Court should also order Defendants to pay the Foundation’s costs and attorneys’ fees incurred in opposing this removal.

DATED: January 11, 2008.

Respectfully submitted,

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⁴ In footnote 9 of their opposition to remand, Defendants argue that the Foundation may only recover fees for attorneys who, while working on the case, are admitted to this Court. This proposition is unsupported. Moreover, Mr. Thompson's declaration was entirely accurate. Mr. Thompson was a licensed attorney as of November 21, 2007. Defendants did not remove this case until November 30, 2007. Thus, all work Mr. Thompson conducted working on the motion to remand was done as a licensed attorney.